

1 has to be produced for the court prior to any
2 trial testimony and would be available, I
3 believe, if we ever -- I don't know when trial
4 is. So I can't say for sure that I will be
5 there. But that's my intent, if it happens.

6 Q. Do you have any plans at this point to
7 revise your report?

8 A. No. Nothing is planned, no.

9 Q. So at this point you are not working on
10 any revisions or amendments to your report?
11 When I say "your report," I'm talking about your
12 expert report filed in this case.

13 A. Correct. Nothing is underway.

14 Q. And nothing planned?

15 A. And nothing is planned.

16 Q. Would you please summarize for me, and
17 then we will go into some more detail, what you
18 did to obtain the facts that you used in
19 preparing your expert report.

20 A. Sure. A key question I always try and
21 ask at the outset is what would the plaintiffs
22 have had the defendants do. I ask it a couple

1 of different ways.

2 If you were the defendant, what would
3 you have done to control your discharges, what
4 do you think the defendants should have done to
5 correct the discharges, what would you have them
6 do.

7 So I ask that question a lot of
8 different ways and try and ask that they think
9 about that, "they" being any engineer that might
10 be retained on the case. Or if the attorney has
11 already had some discovery material, you look
12 through the discovery material and see if there
13 is any kind of document or admission that sheds
14 some light on what the defendant should have
15 done. What would you have them do.

16 That was one of the first things I did,
17 is I put that question out there.

18 Q. To who?

19 A. I asked that it be asked of the
20 engineering experts. The engineering experts,
21 it turned out, were out of the country in the
22 first part of December. So I had to bide my

1 time a little bit on that.

2 So I went and began to collect
3 financial information from discovery of the Teck
4 Cominco Alaska, Incorporated annual reports that
5 were sent to me.

6 I went and downloaded annual reports of
7 Cominco prior to -- say '98, '99, prior to their
8 merger.

9 Q. That's Cominco Alaska we are talking
10 about?

11 A. Cominco Alaska.

12 Q. Thank you.

13 A. Then I also looked at Teck annual
14 reports when they owned significant portions of
15 Cominco Alaska. I think that was also from '98,
16 '99 period.

17 I began to assemble in general terms a
18 financial profile of the parents and the mine
19 operation. I looked at a map to find out where
20 this place was.

21 There is also some financial
22 information, general economic information that I

1 might need. So I went and updated that
2 material. That basically is tax rates, price
3 indices, interest rates. And I began to get all
4 that material together.

5 The engineers returned from their
6 travels. And about the 20th or so of December
7 we held a conference call between myself and
8 Luke Cole, Bob Moran, Randy Fischer, Ken Fucik,
9 and we talked for about an hour and a half.

10 The outcome of that conversation was
11 that no one could be very specific about what
12 they would have the defendant do, that there was
13 a consensus that what the defendant should have
14 done -- I basically put the question to them
15 about three quarters of the way into the
16 conversation, I said, "all right, I'm the vice
17 president of environmental affairs for Teck
18 Cominco, the parent, and I've got this mine in
19 Alaska and I've got to go to the board and get
20 an appropriation. What the heck should I tell
21 them? You are my consultants. What should I
22 tell my board?"

1 opportunities.

2 Q. I have that. Let's look at the
3 for-profit corporations.

4 A. All for profits are the same unless
5 they are bankrupt.

6 Q. So that's the only distinction you
7 would make in calculating the economic benefit
8 any of these cost-forward models that we are
9 talking about have. Using the equity cost of
10 capital and WACC, that's the only distinction
11 you would make when you look at return on
12 investment?

13 A. Yes.

14 Q. If you turn to page 8 of your report,
15 please.

16 A. With you.

17 Q. In the first paragraph, you say, "I use
18 Teck Cominco's borrowing from 1999 to 2003, a
19 capital structure of 25 percent debt and 75
20 percent equity and an equity return."

21 I believe your answer was you got this
22 from the financial statements of Teck Cominco

1 Limited.

2 A. Correct.

3 Q. How did you actually calculate this 25
4 percent debt, 75 percent equity off the Teck
5 Cominco Limited financial statements?

6 A. I looked at the long-term debt as a
7 share of debt plus equity.

8 Q. That's it?

9 A. That's it.

10 Q. I would like to move down to the bottom
11 of page 8 here now and talk about ability to
12 pay. We have referenced today and you reference
13 here in your expert report EPA's ABEL model.
14 Can you explain to me what the ABEL model is.

15 A. The ABEL model is a way of calculating
16 available cash flows from a company's financial
17 statements.

18 Q. Did you follow the ABEL model here?

19 A. More or less. I made some
20 simplifications to it.

21 Q. I was going to ask you, I notice at the
22 bottom, the last sentence of this page says what

1 you did here, you say, is consistent with EPA's
2 ABEL model. I didn't know whether you exactly
3 followed it or you took some deviations.

4 A. I don't think there has ever been a
5 model EPA has used that I have exactly followed.

6 Q. Can you tell me what your deviations
7 were from EPA's ABEL model and the ability to
8 pay calculation you did?

9 A. Deviations. EPA's model constructs a
10 database of available cash flows and then
11 projects that forward into the future and then
12 discounts that back to present time.

13 I do not project it forward nor
14 discount it back to present time. I simply take
15 available cash flows from a historical period.
16 In this case I think it was five years, '99 to
17 2003. That forms the database over which I make
18 my judgments.

19 Q. Here you say that you are looking at
20 the financial performance of Teck Cominco
21 Alaska. Were you working off Teck Cominco
22 Alaska's financial statements or using Teck

1 Cominco Limited's financial statements?

2 A. Teck Cominco Alaska.

3 Q. Why were you using Teck Cominco Alaska
4 instead of the limited?

5 A. I wanted to see if Teck Cominco Alaska
6 could survive.

7 Q. You didn't assume they would get their
8 money from the parent corporation?

9 A. Right, I did not. I wanted to see if
10 Teck Cominco Alaska, Incorporated could survive.

11 Q. I believe you mentioned that you had
12 reviewed Mr. Fuhrman's rebuttal report in this
13 case.

14 A. I saw that about a week ago.

15 Q. Did you recall reading in it his
16 criticisms of your ability-to-pay analysis?

17 A. You know, I didn't spend any time with
18 that.

19 Q. I believe we already have that marked
20 as Exhibit 3.

21 MR. COLE: There is no exhibit marked
22 that is Fuhrman.

1 MR. HARTIG: Let's get it, then.

2 MR. COLE: Let's take a short break for
3 the witness.

4 (Recess.)

5 (Kavanaugh Exhibit 5 identified.)

6 MR. HARTIG: Go to page 14 near the
7 bottom of the page. That's the ability-to-pay
8 analysis section.

9 (Witness examined the document.)

10 BY MR. HARTIG:

11 Q. We took a short break here, and during
12 that break, Dr. Kavanaugh, I gave you the
13 opportunity to review Mr. Fuhrman's rebuttal
14 report which has been marked as Exhibit 5.

15 A. Yes. I skimmed through Section III.

16 Q. Had you reviewed this report before?

17 A. No, I hadn't. I was aware of it, just
18 didn't pay much attention to that or Section IV.

19 Q. Have you reviewed Section III now of
20 this report?

21 A. Well, I have looked through it.

22 References are made to a number of calculations.

1 I haven't had the time to sit down and look at
2 those. So I'm not in a very good position to
3 comment on any of the analysis that he did.

4 Q. I would like you to ask you some
5 specific questions. If you are not prepared
6 today to answer those questions, just tell me.
7 Otherwise, I would appreciate your best answer.

8 A. Okay.

9 Q. Do you agree with Mr. Fuhrman's
10 criticism that your analysis of Teck Cominco's
11 ability to pay gave equal weight to each year's
12 financial results?

13 A. Yes.

14 Q. You agree that you should have?

15 A. I did. I gave equal weight to each
16 year's financial results.

17 Q. Is that consistent with the ABEL model?

18 A. ABEL doesn't do it that way.

19 Q. Why did you choose not to do it that
20 way?

21 A. Because there is no good reason not to
22 give equal weight to every year that you have

1 data on.

2 Q. Why do you say that?

3 A. I want a reason for reducing the
4 importance of an observation before I reduce it.
5 The ABEL User Manual reduces it so that it can
6 make a forecast into the future. I'm not making
7 a forecast into the future.

8 I looked at each individual year and
9 said each individual year's experience, and we
10 can go to my expert report --

11 Q. We are looking at Exhibit 1?

12 A. We are back to Exhibit 1. We can go to
13 the table at the bottom of page 9. The table
14 has years 1999 to 2003. The bottom line is it
15 reports it in constant 2003 dollars. I gave
16 equal weight to each of those years, and I
17 wanted to give equal weight to each of those
18 years.

19 Q. Let me ask you another question while
20 we are on this table.

21 This table, I take it, these are from
22 the financial statements?

1 A. Yes, the annual reports of Teck Cominco
2 Alaska, Incorporated.

3 Q. Do you agree that the ABEL model is
4 based on tax return data as compared with your
5 analysis using financial statements?

6 A. I don't necessarily agree with that. I
7 know that -- I don't know that you have to use
8 it. I know you don't have to use tax data.
9 They might suggest that you use tax data.

10 Q. Why do you choose not to use the tax
11 data in this instance?

12 A. I had Teck Cominco Alaska,
13 Incorporated's annual reports. I didn't have
14 their tax data.

15 Q. If you would have had the tax data,
16 would you have used the tax data?

17 A. No. I think I would have gone with the
18 annual reports.

19 Q. What if the tax data would have made a
20 significant difference in your calculation?

21 A. I would like to know why they are
22 telling their shareholders one thing and the